



# Child Law Practice

Vol. 27 No. 9

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*Helping Lawyers Help Kids*

## ENGAGING FATHERS

Article #1 in a series

### Advocating for the Constitutional Rights of Nonresident Fathers

*Vivek S. Sankaran*

**M**onths after a child welfare case is petitioned, a nonresident father appears in court and requests custody of his children who are living in foster care. Little is known about the father, and immediately, the system—judge, caseworkers, and attorneys—view him with suspicion and caution, inquiring about his whereabouts and his prior involvement in the children's lives.

Those doubts, in turn, raise complicated questions about his legal rights to his children.

- Does the Constitution give him any rights to his children and is he entitled to a presumption of parental fitness?
- Did he preserve those rights?
- Does state law grant him stronger protections?
- Is the court permitted to place the children in foster care if no allegations of unfitness are made against him?

As a practitioner working in the child welfare system, you're likely to face this scenario. The largest percentage of child victims of abuse and neglect come from households headed by single mothers. Consequently, dependency proceedings frequently focus on reunifying children with their mothers.<sup>1</sup> The child welfare system frequently responds to this dynamic by treating fathers as legal strangers to their children and minimizing the importance of their rights. Often, involving fathers is an afterthought. Evidence reveals

that child welfare caseworkers, courts, and attorneys typically do an inadequate job of locating nonresident fathers at the outset of a case, involving them once identified, and ensuring their constitutional and statutory rights are fully protected.<sup>2</sup>

But a growing consensus has emerged that disempowering fathers in this way harms children, who generally benefit when both parents participate in their lives.<sup>3</sup> Engaging fathers in their children's lives is linked to improved physical and mental health, self-esteem, responsible sexuality, emotional maturity and financial security for children.<sup>4</sup> In contrast, children in homes without fathers tend to experience high rates of poverty at an earlier age, and are more likely to have problems in school and/or become involved with the criminal justice system.<sup>5</sup> Additionally, involving fathers in the child protection process increases potential placement options for children in foster care as the father may successfully gain custody or help identify paternal relatives who may be willing to care for the

child. Fathers may also help support their children financially. Efforts are underway across the country to transform child welfare systems to recognize rights of fathers and develop practices and procedures to help them participate in the child welfare process.

This article is the first in a series on best practices to engage nonresident fathers. It helps practitioners protect nonresident fathers' constitutional rights. After briefly reviewing parents' constitutional rights, the article provides a framework to assess whether a nonresident father has perfected these rights and taken steps to preserve them. The article then discusses states' efforts to adjudicate the rights of nonresident fathers and encourages attorneys to determine if those efforts are constitutional. Zealous advocacy will help ensure the child protection system validates the meaningful

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## ABA Child Law PRACTICE

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relationships between nonresident fathers and their children.

## Preserving Constitutional Rights of Nonresident Fathers

Your first task as a practitioner working with nonresident fathers is to determine whether the father's relationship with his child is constitutionally protected because of the procedural protections that result if constitutional rights exist. The Supreme Court has recognized a birth parent's right to direct the upbringing of his or her child as a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution.<sup>6</sup> Described as "one of the oldest of the fundamental liberty interests,"<sup>7</sup> the parental right has been applied to protect many parental decisions. For example, it prevents the state from directing a child's religious upbringing,<sup>8</sup> choosing with whom the child should associate,<sup>9</sup> and making medical decisions for the child.<sup>10</sup> These holdings rest on the premise that the "natural bonds of affection lead parents to act in the best interests of their children."<sup>11</sup>

### Parents' Constitutional Rights in Child Welfare Proceedings

In child protection cases, this right has fueled constitutionally-based procedural protections for parents. If the state seeks to remove a child from the home, an emergency hearing must be held promptly and the state must prove why removal is necessary. Before the state assumes extended custody of the child, a finding of unfitness is required. The parent must receive adequate notice and a meaningful opportunity to be heard at the hearing where this finding is made.<sup>12</sup> Before the state terminates parental rights, it must prove parental unfitness by clear and convincing evidence<sup>13</sup> at a

## Key Supreme Court Cases

- *Stanley v. Illinois*, 405 U.S. 645 (1972).
- *Quilloin v. Walcott*, 434 U.S. 246 (1978).
- *Caban v. Mohammed*, 441 U.S. 380 (1979).
- *Lehr v. Robertson*, 463 U.S. 248 (1983).
- *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

hearing. Due process may mandate appointing counsel to represent the parent at this hearing.<sup>14</sup> Thus, resolving this threshold question—whether the nonresident father's relationship with his child is constitutionally-protected—is crucial in determining if he is entitled to other constitutional protections, all of which trump conflicting federal and state statutes.

### Assessing if Federal Constitutional Rights Exist

How do you determine whether a nonresident father is entitled to constitutional protections?

#### *Parental Involvement*

The Supreme Court has answered this question by looking at the level of involvement of the nonresident father in his child's life. "When a father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause."<sup>15</sup> For example, in *Lehr v. Robertson*, the Supreme Court upheld a New York statute that did not require a father to be notified of his child's impending adoption because the father did not take meaningful steps to establish a parental relationship with his child.<sup>16</sup> The Court reasoned:

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### California's Foster Care Reimbursement Rates Violate Federal Law

*Calif. State Foster Parent Assoc. et al. v. Wagner*, No. 07-05086 (N.D. Cal.).

Three nonprofit foster parent organizations filed a §1983 action against the California Department of Social Services (CDSS) claiming its payment rates for foster parents were too low and violated the federal Child Welfare Act.

The Child Welfare Act outlines requirements for states that receive federal funding for their foster care and adoption programs. Under the Act, child welfare maintenance payments must be sufficient to cover specific foster care costs, including the costs of providing food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance for each child, and reasonable travel costs. California receives federal monies under the Act and CDSS is responsible for administering them, which it does by following a rate schedule set by the California legislature.

The monthly reimbursement rates at issue in this decision were: \$446 for ages 0-4; \$485 for ages 5-8; \$519 for ages 9-11; \$573 for ages 12-14; \$627 for ages 15-19. Plaintiffs claimed these rates failed to cover the Act's enumerated foster care costs by 29-40%, depending on the child's age. They further claimed that in setting the foster care payment rates, California does not consider the actual cost of providing the Act's enumerated costs; rather, the rates are set by the state's legislature. Such low reimbursement rates, they claimed, fail to promote placements of children in the least restrictive most family-like settings as few foster parents can afford to participate in the program under the existing rates.

Defendants moved to dismiss, arguing that the plaintiffs lacked a private right of action under §1983 to enforce the Child Welfare Act. The United States District Court for the Northern District of California denied the motion, finding plaintiffs could pursue a private right of action under §1983. Plaintiffs and defendants both sought summary judgment.

The District Court for the Northern District of California granted plaintiffs'

motion for summary judgment in part. To determine if the defendants violated the Act, the court looked to two prior district court opinions addressing the adequacy of state foster care maintenance payments. *California Alliance of Child and Family Servs. v. Allenby*, 2008 WL 686860 (N.D. Cal. 2008) and *Missouri Child Care Assoc. v. Martin*, 241 F. Supp. 2d 1032 (W.D. Mo. 2003) interpreted the Act's requirements, both agreeing to the following principles:

- the Act places a binding obligation on states that accept federal funding to make foster care maintenance payments;
- states must consider the costs of the enumerated items that the foster care maintenance payments must cover when setting rates;
- the Act requires substantial compliance, not exact compliance, with its mandates regarding foster care maintenance payments; and
- states may consider budgetary factors when setting rates, but budgetary factors may not be the only consideration.

In *Missouri Child Care Association*, the district court found the state violated the Act because Missouri based its foster care reimbursement rates on budget considerations alone, not on other factors required by the Act.

In contrast, *California Alliance* found no violation of the Act. That case focused on California's reimbursement rates for group homes and institutional foster care providers, not rates for individual foster parents. It found California's rates complied with the Act because the group home rate structure had been based on actual data setting the providers' rates, costs and staffing levels; the rates were based on the Act's enumerated criteria; and the level of the group home rates substantially complied with the Act.

In this case, the plaintiffs distinguished California's reimbursement rates for individual foster parents from the rates for group homes and foster care institutions that were addressed in *California Alliance*. They successfully showed that, unlike the rates for group homes and foster care institutions, the individual foster parent reimbursement rates were set after considering only budgetary issues, not the Act's mandatory cost factors. Further, the legislation establishing the foster parent reimbursement rate lacked a methodology and the defendants were unable to explain how or if the rates actually ensured the enumerated costs mandated by the Act were covered.

The court therefore concluded that defendants violated the Act and granted plaintiffs' motion for summary judgment in part. It also ordered defendants to devise a system to assess the actual costs of supporting children in foster care.

### Noncustodial Father Entitled to Reunification Services Absent Statutory Exception

*In re Adrianna P.*, 81 Cal. Rptr. 3d 918 (Ct. App. 2008).

Dependency proceedings were filed on behalf of two children based on the mother's physical abuse of one child. The trial court ordered the child welfare agency to provide reunification services to the mother. It also ordered services for each child's noncustodial father (the mother's current boyfriend and her prior boyfriend). Eventually services to the fathers were terminated and a plan of

guardianship with a grandparent was approved, followed two years later by a plan of return to the mother with services. Soon after, dependency jurisdiction ended.

Within a few weeks, the mother again physically abused one of the children. By then, the mother had had two more children with her current boyfriend.

(Continued on p. 141)



## Alabama

*T.B. v. Cullman County Dep't of Human Res.*, 2008 WL 4182516 (Ala. Civ. App.). TERMINATION OF PARENTAL RIGHTS, RELATIVE PLACEMENTS

Trial court properly terminated mother's parental rights rather than pursue relative placement; evidence of grandmother's past neglect, criminal history, and inappropriate behavior in visits supported finding that she was not a fit and willing relative to serve as a placement and alternative to termination.

*R.W. v. G.W.*, 2008 WL 2623929 (Ala. Civ. App.). TERMINATION OF PARENTAL RIGHTS, JURISDICTION

After Georgia court placed dependent child with great-aunt who later moved to Alabama, termination of parental rights order issued by Alabama court was void as Alabama lacked subject-matter jurisdiction; because mother still resided in Georgia at the time of termination hearing, Georgia remained home state under the Uniform Child Custody Jurisdiction and Enforcement Act.

## Arizona

*Bobby G. v. Ariz. Dep't of Econ. Sec.*, 2008 WL 4415149 (Ariz. Ct. App.). TERMINATION OF PARENTAL RIGHTS, ABANDONMENT

Sufficient evidence supported abandonment finding in termination of parental rights hearing; though father argued his failure to contact child for four years was justified because the mother concealed the child, there was no documentary evidence that father tried to locate his child.

## California

*In re Brandon T.*, 2008 WL 2477433 (Cal. Ct. App.). TERMINATION OF PARENTAL RIGHTS, ADOPTION

Trial court correctly found child was likely to be adopted as required in termination of parental rights proceeding; though child had multiple special needs and was unlikely to be adopted generally, placement with relatives who wished to adopt him nullified these concerns and lack of a completed adoptive home study was not a realistic barrier since relatives passed foster parent clearances and previously adopted two children.

*In re Esmeralda S.*, 2008 WL 2807427 (Cal. Ct. App.). DEPENDENCY, GUARDIANS AD LITEM

Though mother's due process rights were violated by appointment of guardian ad litem without her consent and without a determination of whether she was competent, violation was harmless because error did not affect mother's case; allegation that mother might have otherwise stated she had Native American heritage was moot since she never confirmed that she in fact had such heritage.

*Mardardo F. v. Superior Court*, 78 Cal. Rptr. 3d 884 (Ct. App. 2008). TERMINATION OF PARENTAL RIGHTS

Twenty-eight year-old father who murdered a 13-year-old girl when he was 15, was properly denied reunification services under statute that denies reunification services to a parent or guardian who "has caused the death of a child through abuse or neglect"; "parent or guardian" refers to current status of parent or guardian in dependency proceeding, and "death of another child" does not only apply to parent or guardian's own child.

## Florida

*In re G.S.*, 2008 WL 4182740 (Fla. Dist. Ct. App.). DEPENDENCY, CHILD WITNESSES

Trial court erred in not directing more than a cursory examination of seven-year-old child for competency to testify and in requiring her to testify in camera without making findings on the record as to reasons for prohibiting parents' attorneys from questioning the child; letter from counselor only indicated that child might be harmed by contact with parents, not that questioning by attorneys would be harmful.

*R.H. v. Dep't of Children & Families*, 2008 WL 2815538 (Fla. Dist. Ct. App.). ADOPTION, APPROPRIATENESS

When competing petitions to adopt were filed by child's current foster parents and former relative caregivers, trial court was not required to determine which adoptive placement was more appropriate; child welfare agency is in best position to determine best adoptive home for child and court need only find the home petitioning with its consent is appropriate.

*Z.M. v. Dep't of Children & Family Servs.*, 981 So. 2d 1267 (Fla. Dist. Ct. App. 2008). TERMINATION OF PARENTAL RIGHTS, DUE PROCESS

Trial court's termination of parental rights on ground of noncompliance with case plan violated due process as ground was never alleged by petitioner; department alleged mother's continued relationship with children was harmful, but did not allege she failed to comply with case plan, expressly declined to amend the petition to include this ground, and thus mother was not provided sufficient notice or a fair hearing.

## Georgia

*In re W.A.P.*, 2008 WL 3906080 (Ga. Ct. App.). DEPENDENCY, REMOVAL

Clear and convincing evidence supported adjudication of mother's infant as deprived to support placement in child welfare agency's custody; mother was emotionally immature and lived for the moment, she made poor judgments and acted irresponsibly with infant, and she lacked awareness of how her behaviors affected infant.

## Illinois

*In re L.H.*, 2008 WL 3990809 (Ill. App. Ct.). DEPENDENCY, STATUS OFFENDERS

Trial court properly found child neglected upon mother's refusal to pick her up from hospital; mother's contention that child was not neglected but should be found dependent as a status offender due to runaway behaviors and stealing was without merit where child posed no danger to family and mother had declined services to address child's issues; child's continued absence from home was not due to her unwillingness but due to mother's refusal to allow her to return.

## Indiana

*Moore v. Jasper County Dep't of Child Servs.*, 2008 WL 4379165 (Ind. Ct. App.). TERMINATION OF PARENTAL RIGHTS, FAILURE TO IMPROVE

Order terminating mother's parental rights was not supported by clear and convincing evidence that she had not remedied the conditions that led to children's removal because order lacked required findings as to termination grounds; though trial court may have terminated because it found the improvements mother made after the children came into

care would not be permanent, the order simply recited evidence at trial without expressly making that finding.

### Kansas

*State v. Bohrer*, 189 P.3d 1157 (Kan. 2008). SUPPORT, GUARDIANSHIP  
Trial court erred in holding father's child support obligation was cut off by appointment of a permanent guardian; unlike adoption or termination of parental rights, guardianship does not sever all parental rights and responsibilities.

### Louisiana

*In re C.R.*, 2008 WL 4226002 (La. Ct. App.). TERMINATION OF PARENTAL RIGHTS, FAILURE TO COMPLY  
Order terminating mother's parental rights was not supported by clear and convincing evidence that mother had not substantially complied with her case plan where most factual allegations supporting ground were shown to be false by documents introduced at trial including allegations regarding anger management, counseling, and Alcoholics Anonymous meetings.

### Massachusetts

*Adoption of Anton*, 893 N.E.2d 436 (Mass. App. Ct. 2008). TERMINATION OF PARENTAL RIGHTS, FITNESS  
Evidence supported finding that mother was unfit to parent where mother married a level three sex offender, who had been convicted of abusing stepdaughter and was a diagnosed pedophile, mother refused to accept husband's previous abuse, and she failed to address child's dental needs or obtain suitable housing, and admitted to using drugs while pregnant with child's half-sibling.

*In re Imelda*, 892 N.E.2d 336 (Mass. App. Ct. 2008). TERMINATION OF PARENTAL RIGHTS, ADOPTIVE PLACEMENT  
Trial court erred in not making detailed findings regarding alleged domestic violence issues in proposed relative adoptive home for best interests analysis in termination of parental rights hearing; though a prior order required the paternal grandmother's partner to complete a batterer's program, there was no evidence or other findings at trial to confirm completion.

### Minnesota

*In re D.F.*, 752 N.W.2d 88 (Minn. Ct. App. 2008). TERMINATION OF PARENTAL RIGHTS, REVOCATION OF STAY  
Where parents voluntarily agreed to termination of their parental rights but order was stayed for 90 days to give them a chance to comply with their case plan, trial court properly lifted stay based on evidence that parents were violating requirements of plan including breaking rules of substance abuse treatment programs.

### New York

*In re Robin G.*, 2008 WL 1946992 (N.Y. Fam. Ct.). DELINQUENCY, REASONABLE EFFORTS  
In juvenile delinquency proceeding in which juvenile was placed in residential treatment program under child welfare agency's supervision, agency and residential program failed to make reasonable efforts to achieve permanency plan of return to parent; agency made little effort to provide mother reunification services, mother was not significantly involved in daughter's planning during placement, and mother's desire for her daughter's return was inconsistent.

*In re Vonta*, 2008 WL 4346434 (N.Y. App. Div.). DEPENDENCY, REASONABLE EFFORTS  
Agency made reasonable efforts to strengthen parental relationship, but despite its efforts father failed to appropriately plan for children's future, thus termination of his parental rights was appropriate; agency repeatedly tried to help father comply with service plan, yet father failed to stop using drugs, visit children regularly, or timely complete drug treatment program.

### North Carolina

*In re A.M.*, 2008 WL 4004236 (N.C. Ct. App.). TERMINATION OF PARENTAL RIGHTS, IMPROPER HEARINGS  
Trial court improperly relied on written reports and prior court orders when making its ruling in termination of parental rights hearing; court should have made independent determination regarding whether neglect supporting termination existed at the time of the hearing, including hearing oral testimony.

### Ohio

*In re A.M.L.B.*, 2008 WL 4377440 (Ohio Ct. App.). TERMINATION OF PARENTAL RIGHTS, BEST INTERESTS  
Termination of father's parental rights to two-year-old daughter was in child's best interests where child had been in foster care since birth, she had special medical needs requiring consistent caregiver, father's visits with child were irregular and of low quality and he failed to attend any of child's medical appointments, and child was doing well in care of foster parents who desired to adopt her.

*In re C.T.*, 2008 WL 4274480 (Ohio). TERMINATION OF PARENTAL RIGHTS, AUTHORITY TO FILE  
Guardian ad litem had statutory authority in child welfare action to file and prosecute motion for termination of parental rights and award permanent custody to child welfare agency; although state statute governing court orders for permanent custody in child welfare cases referred to motions by child welfare agencies, statute did not mandate that only agencies may file such motions and GAL had independent statutory authority to file motions aimed at protecting child's best interests.

### South Dakota

*People in re D.A.J.*, 2008 WL 4441075 (S.D.). DEPENDENCY, CONTINUANCES  
Father was not entitled to continuance in dependency proceedings so that he could testify at abuse and neglect adjudicatory hearing without risk of incriminating himself before his criminal trial; child's best interests require prompt resolution of his dependency status where abuse and neglect proceedings had been pending for nearly a year and no date for criminal trial had yet been set.

### Texas

*In re B.W.*, 2008 WL 4427680 (Tex. App.). DELINQUENCY, PROSTITUTION  
Thirteen-year-old juvenile could be adjudicated delinquent for committing prostitution; statutory definition of "delinquent conduct" includes prostitution and prostitution statute did not block delinquency adjudication for committing prostitution since doing so would undermine intent of statute to prevent a person from compelling a child into prostitution by letting children engage in such conduct without consequences.

## About This Series

This is the first in a series commissioned by the National Quality Improvement Center on Nonresident Fathers and the Child Welfare System (QIC). The QIC is a joint effort between American Humane, the American Bar Association Center on Children and the Law and the National Fatherhood Initiative and is funded by the U.S. Department of Health and Human Services (DHHS). This project resulted from the federal Child and Family Services Reviews and DHHS reports showing little meaningful engagement between the child welfare system and fathers.

The series will provide attorneys and judges tools to better engage fathers and promote the importance of gaining more knowledge about father involvement in child welfare proceedings. Visit

**www.fatherhoodqic.org** for more information. The series will cover:

- ☒ **Advocating for Nonresident Fathers' Constitutional Rights (this issue)**
- ☐ Representing Nonresident Fathers
- ☐ Working with Males and Understanding Male Help-Seeking Behavior
- ☐ Involving Nonresident Fathers in Child Welfare Proceedings: Tips for Judges
- ☐ Engaging Incarcerated Fathers in Child Welfare Proceedings
- ☐ What Father's Counsel Needs to Know about Child Support
- ☐ Ethical Considerations for Attorneys Representing Nonresident Fathers

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The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.<sup>17</sup>

Similarly, in *Quilloin v. Walcott*, the Court held that a birth father, who had minimal contact with the child, could not disrupt a child's adoption into a family with whom the child had already been living.<sup>18</sup> In both decisions, the Supreme

Court prevented fathers who had not made efforts to establish a relationship with their children from using the Constitution to disrupt the child's permanent placement.

But when the father has such a relationship, the Court has prevented states from infringing on the father-child bond without providing adequate process. In *Caban v. Mohammed*, the Court struck down a New York statute that denied a father the right to object to an adoption to which the biological mother had already consented.<sup>19</sup> The Court held that since the father was as involved in the children's upbringing as their mother, they both had to be treated equally.<sup>20</sup> Although the Supreme Court has never proscribed the specific actions a nonresident father must take to perfect his constitutionally-protected interest in his child, the Court's rulings clarify that the rights of fathers who have established relationships with their chil-

dren are constitutionally protected from state interference absent proof of unfitness.

### *Paternity Establishment*

Additionally, the Supreme Court has held that due process requires states to give all fathers the opportunity to establish parental relationships by allowing them to claim their interest in the child soon after the child's birth.<sup>21</sup> States have created several ways for fathers to assert parentage. In some states, fathers have to file an affidavit of paternity jointly with the child's mother or institute a paternity suit. Others use putative father registries to let fathers assert their interests. State practices vary on this issue; as the father's attorney, you will need to know these differences. Most appellate courts find a father's failure to comply with state procedures constitutes a permanent waiver of the father's rights to his child.<sup>22</sup>

### *Exceptions*

Extending substantial protections to a birth father who has a relationship with his child and allowing all fathers an opportunity to claim their parental interest soon after the child's birth are well-established principles. The only exception is when, under state law, another man, typically the husband of the child's mother, has been designated the child's legal father. A number of states have strong presumptions that the husband of the child's mother is the legal father if the child was born during the marriage. In these states, even if another man claims to be the child's birth father, he does not have any standing to assert his rights since the law recognizes someone else as the child's legal father. This statutory scheme was challenged in *Michael H. v. Gerald D.*, where the Supreme Court, in a split decision, affirmed these statutes.<sup>23</sup> Be aware of the intricacies of your state's paternity laws to decide how your clients' rights may be impacted if



another man claims to have a parental relationship with the child. For example, some jurisdictions, like Louisiana, have allowed courts to permit dual paternity in limited situations.<sup>24</sup>

### Practice Tips

How do these constitutional principles translate into good practice? Once the nonresident father is identified, you will need to determine his prior involvement in the child's life.

- Did he pay child support? When, and how frequently?
- How often did he visit the child?
- Did he provide the child's mother any assistance during her pregnancy?
- Did he send gifts and/or cards to the child?
- Did he attend school meetings or take the child to doctor appointments?
- Is his name on the birth certificate?

Answering these questions will flesh out whether the father developed the type of relationship with his child that courts deem constitutionally-protected. If a relationship exists, the father is guaranteed the due process protections noted above, regardless of conflicting state and federal laws, unless state law has designated another person as the child's legal father. If no other legal father exists, the father must be given notice and an opportunity to be heard and the state cannot interfere with his custodial rights absent proof of unfitness. His rights to the child are substantial and state encroachment must be justified by compelling reasons.

If a relationship does not exist, assess whether the father's opportunity to establish a parental relationship was blocked in any way.

- Does state law provide adequate mechanisms for the father to

### Nonresident Father Involvement: Key Statistics

In a multistate study, researchers conducted telephone interviews with 1,222 caseworkers in Arizona, Massachusetts, Minnesota, and Tennessee. Caseworkers were interviewed about 1,958 children in their caseloads, each of whom had a living father who did not reside in the household from which the child was removed. The study found:

- 72% of caseworkers noted that paternal involvement enhanced child well-being
- 68% of fathers were identified by the caseworker
- 55% of fathers were actually contacted by the caseworker
- 50% of those fathers contacted expressed interest in their child living with them
- 56% of contacted fathers (30% of all fathers in the study) visited their child
- 50% of contacted fathers (28% of all fathers in the study) expressed interest in assuming custody of their child
- 4% of cases involving nonresident fathers had a goal of reunification with the father

Source: *What About the Dads: Child Welfare Agencies' Efforts to Identify, Locate, and Involve Nonresident Fathers* (2006). Available at: <http://aspe.hhs.gov/hsp/06/CW-involve-dads/index.htm>

become involved in the child's life?

- Did the child's mother in some way prevent the father from developing a relationship with the child?
- Did the father make all reasonable efforts to form a parental relationship?
- Was the child taken into state care almost immediately after birth (e.g., from the hospital)?

If evidence shows the father never had a meaningful opportunity to create a parental bond with his child, you could argue that the Constitution requires that he be given the opportunity. In *Lehr*, the Supreme Court specifically analyzed whether state law protected a father's right to form such a relationship. Evidence of fraud or concealment on the part of the mother or the state agency may help persuade a judge to give the father an opportunity to assert his rights. When representing nonresident fathers, ensure that the constitutional protections given to all parents are afforded to those fathers whose prior actions

merit such protection.

### Determining if State Law Protects Fathers' Rights

Assuming the nonresident father has perfected his constitutional rights to his child, you must next determine whether provisions under state law are constitutional.

- Does state law provide him with notice and an opportunity to be heard about his child's custody?
- Does it give him a presumption of parental fitness?

If not, the state may have impermissibly encroached upon his rights based solely on a subjective determination of what is best for his child.

Thoroughly understanding the interplay between constitutional rights and state statutory provisions is crucial in vindicating the rights of nonresident fathers. Generally, most states provide nonresident fathers basic procedural rights to:

- notice of proceedings and opportunity to participate
- visitation with children

## Benefits of Nonresident Father Involvement

A multistate study using administrative data supplied by each of the states that participated in the original *What About the Dads* study examined case outcomes for the children whose caseworkers were previously interviewed. This study found that children whose fathers were more involved:

- had a higher likelihood of reunification and lower likelihood of adoption;
- were discharged from foster care more quickly than those with less or no paternal involvement; and
- had substantially lower likelihood of subsequent maltreatment allegations.

**Source:** *More About The Dads: Exploring Associations between Nonresident Father Involvement and Child Welfare Case Outcomes* (2008). Available at: <http://aspe.hhs.gov/hsp/08/moreaboutdads/>

- court-appointed counsel if indigent

But states vary considerably on two key issues: 1) whether the child must be placed with the nonresident father absent proof of unfitness, and 2) whether the court can order a fit nonresident father to comply with services it deems are in the child's best interests. Differing state approaches to these issues are described below.

### No Parental Presumption

A number of states, such as Michigan and Ohio, have policies permitting courts to deprive nonresident fathers of custodial rights to their children immediately upon an adjudication or plea finding that the mother abused or neglected them.<sup>25</sup> In these jurisdictions, immediately upon a finding against one parent, the trial court obtains custody of the child and can issue any order it

deems is in the child's best interest. Even absent a finding of unfitness against the nonresident father, the court can place the child in foster care, compel the nonresident father to comply with services, and order that the father's rights be terminated based on failure to comply with those services. These systems treat nonresident fathers as legal strangers to the child, and the burden is on them to prove to the court it is in the child's best interest to be placed with them.

### Deprivation of Legal Custody

Other jurisdictions have adopted a more nuanced approach while continuing to deprive nonresident fathers of full custodial rights.<sup>26</sup> In these courts, judges recognize the constitutionally-based parental presumption but only apply the presumption to the physical custody of the child. Absent a finding of unfitness, nonresident fathers are granted physical custody of their children, but the court still retains legal custody. That is, the court makes decisions about the child and

can order the nonresident father to comply with services. While safeguarding the physical custody rights of nonoffending parents, these systems restrict their legal custody.

### No Jurisdiction

Finally, two states, Maryland and Pennsylvania, have adopted a completely different approach.<sup>27</sup> In those states, if a nonresident father is willing to immediately assume care and custody of the child and is not unfit, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child. The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the nonresident father before dismissal. Once the custody transfer is made, all court involvement or oversight will end.

As the brief discussion above shows, states differ significantly on whether the nonresident father has a presumptive right to custody of his child and whether he can be forced to comply with services.<sup>28</sup> If a state's

## Tips for Agency Attorneys

Child welfare agency attorneys also have an important role to play in ensuring that fathers' constitutional rights are protected. You can:

- Ensure the nonresident father is identified and located early in the case and receives notice of all child protective proceedings.
- Ensure the child welfare agency conducts comprehensive assessments of nonresident fathers (and any paternal relatives who express interest) immediately after they request custody or visitation.
- Encourage caseworkers to include the father in his child's case plan, focus on his strengths, and offer him appropriate services.
- If no evidence of parental unfitness exists, counsel the child welfare agency that the father has a constitutional right to obtain custody over his child.
- Ensure court orders and agency practices do not hinder the father's right to visit with his child without proof that it may harm or endanger the child's safety or well-being.

Remember that all parties in child welfare proceedings need to work together to ensure that constitutional rights are respected, delays and appeals are minimized, and reunification or other permanency outcomes are achieved promptly.



practices conflict with the procedural protections guaranteed by the Constitution, it is essential to file all necessary pleadings to safeguard such rights. These may include:

- making a request at the detention or shelter care hearing for immediate placement of the child with the father.
- filing a motion challenging the imposition of services on your client absent a finding of unfitness.
- arguing that if a fit nonresident father requests custody, then the court cannot interfere with his custodial rights in any way.

Appeals of trial court decisions should be taken immediately, as opposed to waiting until after the father's rights are terminated because, at that point, many of the challenges may be moot or be deemed waived by the court. Of course, the specific arguments that you should make in a given case will depend on the wishes and interests of the client. Always remember to evaluate whether the decisions made by the court and the child welfare agency protect fathers' constitutional rights.

## Conclusion

Traditionally, the basic constitutional rights of nonresident fathers in child welfare cases have been given short shrift. As an advocate for nonresident fathers, you can change this dynamic by challenging practices that violate the basic procedural protections that the Constitution provides many fathers. By doing so, the child protection system will begin opening its doors more widely to invite fathers to actively plan for their children's well-being.

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## Additional Resources

- Greene, Angela. "The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases." *Alaska Law Review* 24, 2007, 173, 181-199.
- Harris, Leslie Joan. "Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions." *Journal of Family Studies* 9, 2007, 281, 307.
- Sankaran, Vivek S. "But I Didn't Do Anything Wrong: Revisiting The Rights Of Non-Offending Parents In Child Protection Proceedings." *Michigan Bar Journal*, March 2006, 22.

He currently serves on the advisory board of the ABA Center on Children and the Law's Parent Representation Project. Professor Sankaran can be reached at [vss@umich.edu](mailto:vss@umich.edu).

## Endnotes

<sup>1</sup> For a comprehensive study of paternal involvement in child welfare cases, see Sonenstein, F., K. Malm and A. Billing. *Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework*. Washington, D.C.: The U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2002. <<http://aspe.hhs.gov/hsp/CW-dads02>>

<sup>2</sup> See Malm K., J. Murray and R. Geen. *What About the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers*. Washington, D.C.: The U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2006, which explores the reasons why child welfare agencies have traditionally excluded fathers from the case-planning process. <<http://aspe.hhs.gov/hsp/06/CW-involve-dads/index.htm>>

<sup>3</sup> For an analysis of the ways that paternal involvement in child welfare cases enhances child well-being, see Malm, K., E. Zielewski and H. Chen. *More About the Dads: Exploring Associations Between Nonresident Father Involvement and Child Welfare Case Outcomes*. Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2008. <<http://aspe.hhs.gov/hsp/08/moreaboutdads/index.htm>>.

<sup>4</sup> See Horn, W. and T. Sylvester. *Father Facts: Fifth Edition*, Gaithersburg, MD: National Fatherhood Initiative, 2007.

<sup>5</sup> National Child Welfare Resource Center for Family-Centered Practice. "Father Involvement in Child Welfare: Estrangement and Reconciliation." *Best Practice/Next Practice: Family Centered Child Welfare*, Summer 2002.

<sup>6</sup> Meyer v. Nebraska, 262 U.S. 390 (1923).

<sup>7</sup> Troxel v. Granville, 450 U.S. 57, 65 (2000).

<sup>8</sup> Wisconsin v. Yoder, 406 U.S. 205 (1972).

<sup>9</sup> Troxel, 450 U.S. at 57.

<sup>10</sup> Parham v. J.R., 442 U.S. 584, 603 (1979).

<sup>11</sup> Ibid., 603.

<sup>12</sup> Stanley v. Illinois, 405 U.S. 645 (1972).

<sup>13</sup> Santosky v. Kramer, 455 U.S. 745 (1982).

<sup>14</sup> Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981).

<sup>15</sup> Lehr v. Roberstson, 463 U.S. 248, 261 (1983).

<sup>16</sup> Ibid., 248.

<sup>17</sup> Ibid., 262.

<sup>18</sup> Quilloin v. Walcott, 434 U.S. 246, 255 (1977).

<sup>19</sup> Caban v. Mohammed, 441 U.S. 380 (1979).

<sup>20</sup> Ibid., 389.

<sup>21</sup> Lehr, 463 U.S. at 262-263.

<sup>22</sup> See, e.g., Marco C. v. Sean C., 181 P.3d 1137 (Ct. App. Az. 2008); Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002); Hylland v. Doe, 867 P.2d 551 (Or. Ct. App. 1994); Sanchez v. L.D.S. Social Services, 680 P.2d 753 (Utah 1984) (all refusing to permit fathers to assert parental rights where they did not comply with statutory requirements).

<sup>23</sup> Michael H. v. Gerald D., 491 U.S. 110 (1989).

<sup>24</sup> Smith v. Cole, 553 So. 2d 847 (La. 1989).

<sup>25</sup> For Ohio cases, see, e.g., In re C.R., 843 N.E.2d 1188 (Ohio 2006); In re Russel, 2006 Ohio App. LEXIS 6565 (Ohio Ct. App. 2006); In re Osberry, 2003 Ohio App. LEXIS 4922 (Ohio Ct. App. 2003). Michigan's approach is exemplified in the following cases: In re Church, 2006 Mich. App. LEXIS 1098 (Mich. Ct. App. 2006); In re Camp, 2006 Mich. App. LEXIS 1620 (Mich. Ct. App. 2006); In re Stramaglia, 2005 Mich. App. LEXIS 1339 (Mich. Ct. App. 2005).

<sup>26</sup> See, e.g., J.P. v. Dep't of Children and Families, 855 So. 2d 175 (Fla. Dist. Ct. App. 2003); In re Jeffrey P., 218 Cal. App. 3d 1548 (Ct. App. 1990).

<sup>27</sup> See, e.g., In re M.L., 757 A.2d 849 (Pa. 2000); In re Russell G., 672 A.2d 109 (Md. Ct. Spec. App. 1996).

<sup>28</sup> None of these states specifically distinguish between mothers and fathers. However, in practice, these different approaches typically affect the noncustodial parents who most often are fathers.

# Special Education Decision Making: Role of the Child's Attorney<sup>1</sup>

*by the Legal Center for Foster Care and Education*

**B**etween a third and half of school-age children in the foster care system receive special education services, compared to only 11% of all school-age children.<sup>2</sup> Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes.

But service delays and other problems will be avoided only if children's attorneys and others working on behalf of children in the child welfare system understand and use the Individuals with Disabilities Education Act (IDEA) to ensure children have legally authorized decision makers.

Remember, many children, including children in foster care, who have learning difficulties and need extra help do not have disabilities or require special education. And children of color are especially at risk of inappropriate placement in special education programs and are consistently overrepresented in such programs. This article addresses special education identification and services for only those children who truly warrant this intervention.

## Understanding the Law

### What does federal law mandate for the education of children with disabilities?

The IDEA is a federal law that requires local education agencies to provide a "free appropriate public education" (FAPE) to children with a qualifying disability.<sup>3</sup> A child with a disability is entitled to a program of special education and related services that will permit her to make meaningful academic and behavioral progress. These services must be listed in an Individualized Education Program (IEP). Whenever possible, children with disabilities should be taught in regular class-

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**Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes.**

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rooms and learn what other students are learning—with the extra help they need.

Determining who can make decisions for a child who needs special education begins with the IDEA's complex definition of "parent." A child cannot be evaluated or begin to receive special education services until an IDEA Parent has given written permission. In most cases it is the IDEA Parent who consents to the first evaluation. It is the IDEA Parent who consents to services beginning under the Individualized Education Program (IEP), or disagrees with the IEP that the school district is proposing and uses the special education hearing and appeal system to get the services the child needs. Making sure that each child in the care of a child welfare agency has an effective IDEA Parent is the best way to ensure that children with disabilities in out-of-home care get the special help they need to achieve their learning potential.

### Who is the "IDEA Parent" for a child in out-of-home care?

The following people can serve as the IDEA Parent:

- ✓ **A birth or adoptive parent.** In the absence of judicial intervention, a birth or adoptive parent who is participating in IEP meetings and is otherwise actively involved in the special education or early intervention process is the child's IDEA Parent. This is true even when the child is living in a foster home or a group setting.
- ✓ **Another qualified person.** If the birth or adoptive parent is not "attempting to act," any of the following individuals can be the IDEA Parent:
  - a foster parent unless barred by state law from serving as an IDEA Parent
  - a guardian (both a general guardian or a guardian specifically authorized to make education decisions)
  - a person acting in the place of the parent with whom the child lives
  - a person legally responsible for the child's welfare
  - a surrogate parent (more on this below)
- ✓ **A person designated by the judge.** As detailed below, new federal rules give a judge broad power to designate a specific person to function as the IDEA Parent and to make special education decisions for a child in the custody of a child welfare agency.

## What obligations does a school district have to involve the IDEA Parent in the special education process?

School districts must take steps to ensure that the IDEA Parent is involved in the special education process, such as including them in IEP meetings and notifying them of proposed changes. Therefore, school districts must know who the IDEA Parent is for each child who is attending their schools. This could be a person who meets the IDEA's definition of parent, a person the court has determined is the IDEA Guardian, or a court or school district-appointed Surrogate Parent.

## What obligations does a school district have to ensure a Surrogate Parent is assigned to serve as the child's IDEA Parent?

✓ **Determining if a Surrogate Parent is needed.** School districts must determine whether a Surrogate Parent is needed when: 1) a child does not have anyone who meets the definition of an IDEA Parent (for example, there is no birth or adoptive parent, there is no foster parent, or the foster parent is barred by state law from serving as an IDEA Parent); 2) the school district cannot locate an IDEA Parent after reasonable efforts; 3) the child is a ward of the state under the laws of the state;<sup>4</sup> or 4) the child qualifies as an "unaccompanied homeless youth."<sup>5</sup> For children in out-of-home care, a Surrogate Parent must always be appointed in situations one and two above.<sup>6</sup>

✓ **Appointing a Surrogate Parent for a child who is a ward of the state under the laws of the state.** Whether an education agency is required to appoint a Surrogate Parent for a child who is a "ward of the state under the laws of that state" depends on: 1) how a state

defines "wards of the state" (for example all children upon entering the custody of the child welfare agency, or all children post-termination of parental rights); and 2) the extent to which those states interpret federal law to permit or even require the appointment of a Surrogate Parent for state "wards of the state" who still have an IDEA Parent such as an active birth or adoptive parent.

For example, some states read the IDEA to require that *all* children who are state "wards of the state" must have a surrogate parent appointed. Other states with similar rules only appoint Surrogate Parents for children who are state "wards of the state" when there is no IDEA Parent. So, to determine which children qualify for Surrogate Parents in your state, it's important to know how your state defines "wards of the state"—and to know how it interprets the federal rules on appointing Surrogate Parents for these children.

✓ **Making reasonable efforts to appoint a Surrogate Parent.** When a school district determines that a Surrogate Parent is needed, it must make reasonable efforts to appoint a Surrogate Parent within 30 days. The best option is a Surrogate Parent (a family member or friend, a former foster parent) who knows the child well and has her confidence. If no one else is available, the school district must recruit a volunteer, perhaps a local CASA member. A Surrogate Parent cannot be a person who is an employee of an education or child welfare agency providing education or care for the child—so a school official or child's caseworker cannot be a child's Surrogate Parent. A school district must also ensure that the Surrogate Parent has no personal or professional conflict with the child and that the person has the

skills to represent the child competently.

## What authority does a family court judge have to appoint an IDEA decision maker for a child?

Judges have three options under the IDEA:

✓ **Initial evaluations:** If the child is in the custody of the child welfare agency and is not living with the birth or adoptive parent or a foster parent who can serve as the IDEA Parent, a judge can suspend the birth or adoptive parent's right to make education decisions for the child and can appoint another person to consent to the child's first special education evaluation. Remember, only an IDEA Parent (which can include a Surrogate Parent or a Guardian as discussed below) can consent to special education services starting—so it's good practice to move forward at the same time to ensure an effective IDEA Parent is in the picture.

✓ **Surrogate Parent:** A judge can appoint a person to be a Surrogate Parent—and thus an IDEA Parent—whenever a child meets the IDEA's definition of "ward of the state." This standard is met

### Education Decision-Making Tools for Advocates

The Legal Center for Foster Care and Education has developed a special education decision-making fact sheet series for:

- children's attorneys
- judges
- caseworkers
- foster parents
- youth in foster care
- educators

**Find them at:** [www.abanet.org/child/education/publications](http://www.abanet.org/child/education/publications)



when the child is in the custody of a child welfare agency AND the child does not have a foster parent who can serve as the IDEA Parent. A Surrogate Parent cannot be a person employed by an agency who provides child welfare or education services to the child.

- ✓ **IDEA Guardian:** The above limits on a judge's authority to appoint a Surrogate Parent do not apply when a judge decides to appoint an IDEA Guardian to make special education decisions on behalf of a child. To the extent permitted under state law (usually whenever the appointment of an IDEA Guardian is in the child's best interests), a judge can appoint a person to serve as an IDEA Guardian who can make special education decisions for a child. A judge can appoint an IDEA Guardian for a child who has been determined to be dependent even when the child remains in the physical custody of the birth parent. Under the federal law, an IDEA Guardian appointed by the court is an IDEA Parent who preempts any other possible IDEA Parent, including the birth or adoptive parent or a foster parent. An IDEA Guardian cannot be the child's caseworker.

### Tips for attorneys/advocates:

- ✓ **Whenever possible, support the birth or adoptive parent as the IDEA Parent for the child.** Most children in care return to their birth or adoptive families. So, when possible and in the child's best interests, keep parents involved and empowered to make education decisions for their children. Remember, special education procedures can be very daunting for parents, and the caseworker can provide essential advice and support. The caseworker can also make sure that

the school district treats the parent of a child in care the same way it treats any other parent. The school district should provide the parents mandated notices, include the parents in the IEP development, and notify them of changes. The caseworker should also respect the parent's rights. If a caseworker wants to attend meetings related to the child, the person should ask the parents for permission to participate. The caseworker can be an advocate for the child's needs and also a support to the parents in their decision-making role.

- ✓ **Make sure there is an IDEA Parent.** Many different people can be viewed as the IDEA Parent, and the rules for these determinations are complicated. A child's attorney can approach this task differently for different children. One option might simply be to make sure that the school has someone serving in the parent role for meetings and important education decisions. Another might be to remind the school officials and child welfare agency professionals that the birth parent retains education decision-making rights. The advocate could ask the judge to take one of the three actions outlined above. Or, the advocate could do all of these things in some cases!
- ✓ **If the current IDEA Parent is not the right person to make education decisions for the child, determine who the right person would be and advocate with the school or the court that she be identified as the education decision maker.** For example, the attorney might ask the court to assign a Guardian or a Surrogate Parent if the parent, although active, is not acting in the best interest of the child when making education decisions. In

another case it might make sense to ask the court to assign a particular individual to serve as a Surrogate Parent. As a child's attorney you should suggest a specific person to serve in this role who is known to the child or who you think would do a good job. Ask the child or youth (or the child's caregiver) who they think would be the best decision maker. This may include a family member such as an aunt or cousin, a family friend or church member, or a court-appointed special advocate (CASA).

- ✓ **If no other more appropriate person is available, consider whether you want to serve (or whether it is appropriate in your role to serve) as the child's Surrogate Parent or Guardian.** The judge or the school district could appoint the child's attorney or other child advocate (for example, a CASA) as the IDEA Parent for the child, but much will depend on state law and regulations whether this is possible in your state. For attorneys who represent children, the decision may depend on the standard of representation in the state or jurisdiction.
- ✓ **Know your state law and how it affects who can be an education decision maker and when.** Know your state's law. Can foster parents serve as an IDEA Parent? Does your state law consider some children to be wards of the state, and if so who is included in that category? Until you know certain things about your state law and how it interacts with the federal rules, you cannot be sure what the federal rules mean in your state.
- ✓ **If a Surrogate Parent is needed, make sure she is appointed timely, has the appropriate training and expertise to make**

**decisions, and has the support to do a good job.** Once a decision is made that a Surrogate Parent is needed (whether it is through a school or court appointment) make sure the appointment occurs quickly, but not more than 30 days after the determination that one is needed. Also, a child's attorney can help make sure that the person being appointed has the ability, skills, and information to fulfill her role. For example, a Surrogate Parent appointed by the school may have plenty of expertise about special education law, but may need more information about the foster care system or specific information about the child. The child's aunt may be appointed by the court or the school, but may need some help understanding how the special education process works and her role.

- ✓ **Advocate for agencies to maintain Surrogate Parent pools—lists of trained and willing people who can serve in the Surrogate Parent role.** Either the school or the child welfare agency could maintain lists of qualified people who can serve as Surrogate Parents. This could help avoid delay in appointing qualified people when a Surrogate is needed. Some states have created statewide programs that have helped in many ways, including ensuring continuity of the Surrogate Parent when the child moves to a different part of the state.

The *Legal Center for Foster Care and Education* is a collaboration between Casey Family Programs and the ABA Center on Children and the Law. Learn more at [www.abanet.org/child/education](http://www.abanet.org/child/education)

#### Endnotes

<sup>1</sup> This article is intended for attorneys who represent children in dependency cases. The advice may also apply to other advocates (including nonattorney advocates) who

represent children in out-of-home care.

<sup>2</sup> Terry L. Jackson & Eve Müller. *Foster Care and Children with Disabilities* (National Association of State Directors of Special Education, Inc., Forum, February 2005), available at [www.nasdse.org/publications/foster\\_care.pdf](http://www.nasdse.org/publications/foster_care.pdf)

<sup>3</sup> The IDEA covers children with disabilities from birth until graduation or the maximum age of eligibility under state law. The rules described in this fact sheet apply to school-aged children and preschoolers (children from their third birthday until school-age), but do not address the separate rules for children, birth through age three. Younger children under age three are entitled to appropriate "early intervention" services, which must be set out in an "Individualized Family Service Plan." Another federal law, §504 of the Rehabilitation Act of 1973, also requires public school districts to provide a "free appropriate public education" to students with disabilities, and to make reasonable accommodations to permit these children to benefit from all aspects of the school program. Some students with disabilities who are not eligible under the IDEA may still be entitled to the protections of §504.

<sup>4</sup> A ward of the state under the laws of the state is different from an IDEA ward of the state. An IDEA ward of the state is defined in the IDEA as a child in the custody of a child welfare agency who does not have a foster parent who can serve as an IDEA parent.

<sup>5</sup> For more information about unaccompanied homeless youth, visit the National Law Center on Homelessness and Poverty website, under Education, at [www.nlchp.org/FA%5FEducation/](http://www.nlchp.org/FA%5FEducation/) and the National Center on Homeless Education website at [www.serve.org/nche/](http://www.serve.org/nche/).

<sup>6</sup> An unaccompanied homeless youth under McKinney-Vento can have an active birth or adoptive parent, or can be living with a person who is acting as the child's parent—in which case no other IDEA parent is required. However, the IDEA also provides that appropriate staff from shelters, independent living programs, and street outreach programs may be appointed as a "temporary surrogate parent" even if the staff person is involved in the care or education of the child until a permanent Surrogate Parent is assigned by the court or the school district.

*(In re Adrianna P., cont'd from p. 131)*

Dependency proceedings were filed on behalf of all four children. The agency requested that services be denied to the parents and a hearing to terminate parental rights or select a permanency plan other than reunification. The children's noncustodial fathers, one of whom was in jail, requested that the children be placed with them. The trial court denied their requests. However, the court ordered the child welfare agency to provide services to both noncustodial fathers, refusing the agency's request to bypass services under California statute. The agency appealed.

The California Court of Appeal, Fourth District, affirmed in part and remanded for further proceedings. On appeal, the agency claimed the trial court improperly found it lacked authority to deny the noncustodial fathers reunification services under California statute where it had denied the fathers' request for placement. They further argued that California statute permits the court to bypass reunification services to noncustodial parents. The noncustodial fathers countered that the bypass provisions of California statute do not apply to noncustodial parents.

The appellate court concluded that § 361.5 of California's Welfare and Institutions Code governs the grant or denial of reunification services to a noncustodial father who has not assumed custody of his child under § 361.2 (which governs placements of children with noncustodial parents). The court explained that when a court removes a child from a parent's custody under § 361 and finds that placing the child with the noncustodial parent would be harmful under § 361.2, the court must order the agency to provide reunification services to the child's mother and the presumed father under § 361.5 unless a statutory bypass exception applies (e.g., a noncustodial father lacks interest in reunification services). The court found that juvenile courts are not required to distinguish between custodial and noncustodial parents when ordering or bypassing reunification services.

The court affirmed the trial court's order requiring the agency to provide reunification services to the mother's current boyfriend, but remanded to the trial court to vacate its order providing reunification services to the jailed noncustodial father.

## Parents' Social Workers Help Parents Succeed

by Lisa Pilnik

For many parents in child welfare cases, finding the right services and completing them are key to resolving what brought them to court and reunifying with their children. Yet starting and sticking with substance abuse treatment, parenting classes, mental health treatment and other services can be difficult for parents already dealing with difficult personal issues (including separation from their children) and not used to accessing community resources. That's where Yolanda Lewis-Harris comes in.

Ms. Lewis-Harris is a social worker who works with respondent parents in child welfare cases in the 4<sup>th</sup> Judicial District in Colorado. She helps her clients find resources that meet their needs, and does whatever it takes to help them succeed, from providing transportation to coordinating with service providers, agency caseworkers and attorneys. Her position is unique in that she is employed by the respondent parents' attorneys, so her clients know she is on their side, and her work is covered by attorney-client privilege.

### Getting Started

Lewis-Harris' work is funded by a family reunification grant given to

her jurisdiction by the U.S. Department of Health and Human Services. Most of the project involved expanding the district's existing work on behalf of substance abusing families—including expanding their family drug treatment court and funding an additional CASA supervisor—but the social worker position is completely new.

The 4<sup>th</sup> Judicial District has 13 panel attorneys who represent respondent parents. Once the federal grant was obtained, the attorneys formed a limited liability company to employ Ms. Lewis-Harris (so her work would be considered attorney-work product), and she was given an office in the courthouse and began work in January of this year. She works only with parents who have substance abuse issues, and her cases are assigned by the courts (after the attorneys and their clients agree) to ensure that she has no more than one case with each panel attorney at one time.

### Doing Things Differently

Unlike most other professionals involved in a child welfare case, Lewis-Harris has an small caseload, between eight and 15 cases at any time. This allows her to become more involved in each parent's life,

and to provide many more day-to-day services and supports. Lewis-Harris generally starts by attending the family's preliminary permanency proceeding (the initial hearing), where the parents are informed of the charges and referred for mental health and substance abuse assessments. At this point Lewis-Harris completes a family data sheet with basic information about the family. She also has parents sign a release form. This confirms the clients want her help, and allows her to provide transportation and speak to other professionals about the case.

The next step is for Lewis-Harris to meet with the parents in their home, preferably within a week of the first court hearing. At the home visit she asks them to share their background and their story, then helps them identify their goals. These goals go beyond the case plan goals, and include things like going to college or moving to a safer community. After that she tries to meet with clients once or twice per week at their homes. These meetings occur more frequently at the beginning of a case, and then decrease as the parents build other support systems.

### Social Workers and Parents Attorneys Working Together Nationwide

Several public defender and parents' attorney offices across the country also employ social workers to assist attorneys with investigations and/or give clients more targeted help and support:

- The **Parent Representation Program of the Washington State Office of Public Defense** has one contract social worker for every four attorneys. They have social workers in 25 of Washington's 39 counties. Social workers provide parent support, investigative, and advocacy services and receive an orientation and continuing education. (View this program's social worker guidelines by visiting "Web Link" at CLP Online: [www.childlawpractice.org](http://www.childlawpractice.org))
- The **Center for Family Representation in New York** works in Community Advocacy Teams consisting of an attorney for the parent, a social worker, and a "parent advocate" (a parent who has successfully reunified with a child in foster care). Find at more at [www.cfrny.org/new\\_legal.asp](http://www.cfrny.org/new_legal.asp)
- **New Jersey's Office of Parental Representation** uses a social worker to supervise its parent advocates. Find out more at [www.state.nj.us/defender/div\\_opr.shtml#GeneralInfo](http://www.state.nj.us/defender/div_opr.shtml#GeneralInfo)



Through their work with Lewis-Harris, parents learn to identify their own needs and become familiar with community resources. An agency caseworker may only have time to hand the parent a list of standard resources, leaving the parent to choose and connect to services. In contrast, Lewis-Harris takes each client to their appointments and ensures they get what they need. This may include visiting a food bank, receiving assistance from churches, requesting public housing, or getting help with rent or utilities.

Another difference between Lewis-Harris and the agency caseworker is that she is on the parents' side. Anything they tell her is confidential from everyone except their attorney (unless there is a safety risk to a child), so parents can feel more comfortable being honest. Although the agency may be compelled to bring the parent back into court if they've done something wrong, Lewis-Harris' first priority is to help the parent address the issue. For example, if a client misses service appointments or suffers a relapse in his substance abuse recovery, he may call Lewis-Harris for help figuring out how to get back on track and then present a plan of action to the agency caseworker and the court.

### Keeping Connected

Lewis-Harris also attends meetings with agency staff and service providers, and will ask the caseworker to schedule these meetings if they are not happening frequently enough (every four to six weeks). This ensures all professionals are on the same page and have the same information. "When we go into court it's really helpful if everyone knows what everyone else's concerns are," says Lewis-Harris, "and what others are proud of with regard to treatment, or if treatment needs to be changed." She also calls the parents' attorneys every week to two weeks to update them, and sees them regularly at court. She lets them know how treatment is going,

### One Mother's Story

Mandy\* became Yolanda Lewis-Harris' client two months after her children were taken into child protective services' (CPS) custody. Mandy was addicted to meth and was a victim of domestic violence. Her five children, whose ages ranged from six to 15, were placed in out-of-home care (three with relatives and two with nonrelative foster parents), due to Mandy's allegedly being under the influence of meth while caring for them. When Mandy's attorney first brought Ms. Lewis-Harris into Mandy's life Mandy was participating in services including substance abuse treatment, individual and family counseling and domestic violence counseling, but was not motivated to complete treatment because she felt she had no support from her treatment program or the family's Department caseworker. She also needed help finding housing and a stable income; both court requirements for getting her children back.

During the first two months they worked together, Lewis-Harris visited Mandy at home one to two times per week and spoke to her by phone every other day. Lewis-Harris made sure Mandy was following through with her services, helped her apply for TANF funds, and spent hours looking at apartments with her. She also coordinated with Mandy's family preservation caseworker so the family would receive the services it needed, without duplicating efforts.

After one month, Mandy found a two-bedroom apartment she could afford. Shortly before she moved in, the Department decided that the relatives the three youngest children were living with were no longer good placement options and gave Mandy physical custody, while retaining legal custody. Lewis-Harris worked with Mandy to quickly enroll the children in a new school, and helped her make sure that they had transportation to all of the family's services.

\*Not her real name.

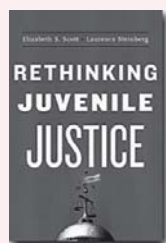
and discusses barriers or issues that have come up, successes to highlight, and what the client wants the attorney to advocate for. She also attends all court hearings unless she has a schedule conflict.

### Charting the Future

The 4<sup>th</sup> Judicial District's family reunification project, including Lewis-Harris' work, is being evaluated by American Humane and they expect to report their findings this fall. James Hustad, the court facilitator for the district, says that anecdotally the success rate for Lewis-Harris' cases appear to be similar to the success rate for the family treatment drug court. Yet assigning Lewis-Harris to a case costs only \$1,200, while the drug court costs \$30,000 per case. Lewis-Harris' successful cases also appear to be

reaching reunification more quickly than the successful family treatment drug court cases do. Due to the potential cost savings and faster outcomes of having a social worker assist respondent parents' attorneys, the courts have asked the legislature to fund three new social worker positions, and believe their request will be granted. Also, although the project now serves only substance abusing parents, Lewis-Harris believes this model could help other special populations, such as nonresident fathers, who are often difficult to engage in child welfare cases and would benefit from the additional support and services.

*Lisa Pilnik, JD, is a staff attorney at the ABA Center on Children and the Law.*



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